

SUPPLEMENTAL BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 07–1475, 07–1477, AND 07–1480

CTIA–THE WIRELESS ASSOCIATION ET AL.

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA

Respondents.

ON PETITIONS FOR REVIEW OF ORDERS OF
THE FEDERAL COMMUNICATIONS COMMISSION

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GLOSSARY

APA	Administrative Procedure Act
CMRS	Commercial Mobile Radio Service
OMB	Office of Management and Budget
PRA	Paperwork Reduction Act

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SUPPLEMENTAL BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

Respondent Federal Communications Commission respectfully submits this supplemental brief in accordance with this Court’s May 9, 2008, order directing the parties to make post-argument submissions concerning the justiciability of this case, given the need for approval of portions of the Commission’s backup power rule by the Office of Management and Budget (OMB). As explained below, authorities such as Hayburn’s Case, 2 U.S. (2 Dall.) 409 (1792), and other decisions involving Executive Branch review of a judgment of an Article III court do not render this case nonjusticiable. Nonetheless, we believe that prudential ripeness considerations counsel in favor of

holding the petitions for review in abeyance pending the OMB review process. The rule petitioners challenge cannot take effect absent contingent future action by another governmental agency – specifically, OMB’s review under the Paperwork Reduction Act (PRA) of the information collection component of the FCC’s rule. Because the Commission’s decision will not have “its effects felt in a concrete way by the challenging parties” until the rule’s information collection requirements have been reviewed and approved by OMB (or reaffirmed by the Commission if OMB disapproves of those requirements), a decision by the Court now would be premature and potentially unnecessary.¹

STATEMENT OF ISSUE PRESENTED FOR REVIEW

The Court’s May 9, 2008, Order directed the parties to address the follow issue:

“Whether the need for Office of Management and Budget (OMB) approval of the backup power rule before it becomes effective, *see* 44 U.S.C. § 3507(b), (c)(2), renders this case nonjusticiable so that the court should hold the case in abeyance pending OMB’s action. Cf. Nat’l Treasury Employees Union v. Fed. Labor Relations Auth., 30 F.3d 1510 (D.C. Cir. 1994).”

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutory and regulatory provisions are reproduced in the appendix to this supplemental brief.

¹ See Devia v. NRC, 492 F.3d 421, 424 (D.C. Cir. 2007), quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967).

SUPPLEMENTAL COUNTERSTATEMENT OF THE CASE

1. The Paperwork Reduction Act, 44 U.S.C. § 3501 et seq., establishes procedures designed to “minimize the paperwork burden for ... persons resulting from the collection of information by or for the Federal Government.”² After a federal agency decides to adopt a new paperwork requirement, the PRA, inter alia, “institutes a second layer of review” conducted by OMB.³ The agency must submit the new paperwork requirement – or in the parlance of the PRA, a request for the “collection of information” – to OMB for approval.⁴

After receiving public comment, OMB has the option to approve or disapprove the collection of information, or “to instruct the agency to make substantive or material change to a collection of information.”⁵ If OMB approves the information collection request, it assigns a control number to be displayed on the paperwork requirement, and the agency may put that requirement into effect.⁶ If OMB disapproves or directs changes to the information collection request, it must provide a publicly available explanation for

² 44 U.S.C. § 3501(1).

³ Dole v. United Steelworkers of America, 494 U.S. 26, 33 (1990); see 44 U.S.C. § 3507.

⁴ See 44 U.S.C. § 3507(a)(2). See also 5 C.F.R. § 1320.3(c) (“Collection of information means ... the obtaining, causing to be obtained, soliciting, or requiring the disclosure to an agency, third parties or the public of information by or for an agency by means of identical questions posed to, or identical reporting, recordkeeping, or disclosure requirements imposed on, ten or more persons, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit.”).

⁵ 44 U.S.C. § 3507(e)(1); see also id. § 3507(d)(6) (decision “to approve or not act upon a collection of information contained in an agency rule shall not be subject to judicial review”).

⁶ 44 U.S.C. § 3507(a)(2), (3).

its decision.⁷ OMB also may “instruct the agency to undertake a rulemaking” if it concludes that substantive or material changes should be made in an information collection.⁸ An independent agency such as the FCC has authority to void any disapproval by OMB in whole or in part by majority vote.⁹

It is a violation of OMB regulations for an agency to impose or modify any paperwork requirement unless the agency first has completed the PRA review process and the information collection requirement has been assigned a valid control number by OMB.¹⁰ “Notwithstanding any other provision of law,” an agency’s failure to satisfy PRA procedures constitutes a “complete defense” to any “penalty for failing to comply with a collection of information.”¹¹

2. The Commission’s backup power rule currently under review in this case imposes both substantive and “information collection” obligations on communications carriers. The rule imposes a general obligation on “local exchange carriers ... and commercial mobile radio service (CMRS) providers [to] have an emergency backup power source (e.g., batteries, generators, fuel cells) for all assets necessary to maintain communications that are normally powered from local commercial power,” except where a provider “demonstrates, through [a] reporting requirement ... that such compliance is

⁷ 44 U.S.C. § 3507(e)(1).

⁸ 5 C.F.R. § 1320.12(f)(1)(ii).

⁹ 44 U.S.C. § 3507(f)(1).

¹⁰ See 5 C.F.R. § 1320.5(a).

¹¹ 44 U.S.C. § 3512. See also Saco River Cellular v. FCC, 133 F.3d 25 (D.C. Cir. 1998).

precluded by” legal, contractual, or public safety constraints.¹² With respect to information collection, the backup power rule requires providers to file, within six months of the rule’s effective date, a report detailing their compliant and noncompliant assets and justifying any exemptions based on legal, contractual, or safety concerns.¹³ In addition, the rule provides that carriers that have identified noncompliant assets that are not entitled to an exemption must file with the Commission, within twelve months of the rule’s effective date, “a certified emergency backup power compliance plan” that describes how the “provider will provide emergency backup power to 100 percent of the area covered by any noncompliant asset in the event of a commercial power failure.”¹⁴

The Commission specified that the backup power rule as a whole (*i.e.*, both the substantive and information collection components) would become “effective on the date of Federal Register notice announcing OMB approval of the information collection [requirement] now contained in [the backup power] rule.”¹⁵ However, after this Court issued its February 28, 2008, order in this case staying the effective date of the rule pending judicial review, OMB informally informed FCC staff that it would prefer that the Commission not initiate the PRA process while the stay remained in effect. Accordingly,

¹² Order on Reconsideration, Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, 22 FCC Rcd 18013, 180035-36 (2007) (Reconsideration Order) (J.A. 832-33).

¹³ Reconsideration Order, 22 FCC Rcd at 18036 (J.A. 833).

¹⁴ Id. at 18037 (J.A. 834).

¹⁵ Reconsideration Order, 22 FCC Rcd at 18032 ¶ 46 (2007) (J.A. 829). As originally adopted, the backup power rule did not contain any information collection requirements. Order, Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, 22 FCC Rcd 10541, 15587-88 (2007) (J.A. 493-94). The Commission adopted the information collection component of the backup power rule during the reconsideration phase of the rulemaking proceeding.

the Commission has not yet submitted its application to OMB for approval of the backup power rule's information collection requirements.

SUMMARY OF ARGUMENT

1. The need for OMB approval of the information collection in the backup power rule before the rule becomes effective does not render this case nonjusticiable under Hayburn's Case and its progeny, which seeks to avoid Executive Branch review of judgments of Article III courts. The OMB has responsibility under the PRA to review the information collection obligations imposed by the backup power rule and to approve, disapprove, or require changes to those requirements. That carefully delineated responsibility gives OMB no warrant to review the Court's resolution of the very different statutory authority and administrative law issues raised by petitioners in this case.

2. Nonetheless, prudential ripeness considerations counsel in favor of holding this case in abeyance pending completion of the OMB review process. The backup power rule is not fit for immediate judicial review nor would withholding such review cause hardship to any party. No part of the rule will become effective unless and until the PRA review process is completed; the rule imposes no legal obligations on petitioners or anyone else until then; and OMB's decisions (and possibly the FCC's response to those decisions) will in large part determine what, if any, rights and obligations flow from the challenged agency action. Deferring judicial review at this time would thus avoid potentially unnecessary adjudication. Under these circumstances, the Court should exercise its discretion to hold the case in abeyance pending completion of the OMB review process.

ARGUMENT

I. THE NEED FOR OMB APPROVAL OF THE INFORMATION COLLECTION IN THE BACKUP POWER RULE DOES NOT RENDER THIS CASE NONJUSTICIABLE UNDER THE HAYBURN'S CASE LINE OF AUTHORITY.

We do not believe that the need for OMB approval renders this case nonjusticiable under decisions such as Hayburn's Case, 2 U.S. (2 Dall.) 409, and National Treasury Employees Union v. FLRA, 30 F.3d 1510 (D.C. Cir. 1994). Those cases stand for the proposition that judgments of Article III courts may not be reviewed by the Executive Branch. See National Treasury Employees Union, 30 F.3d at 1513 (“a federal court is not presented with a justiciable case or controversy when its decision would go into effect only upon the approval of a reviewing official in the executive-branch”).¹⁶ This case, however, presents no such concern. Any judgment this Court might render in this case would relate directly to the specific issues raised by the petitioners: (1) whether the Commission exceeded its statutory authority under the Communications Act when it adopted the backup power rule; (2) whether the Commission provided adequate notice of the proposed rule; and (3) whether the rule is arbitrary and capricious under the Administrative Procedure Act (APA). OMB's task, in contrast, is to inquire into an entirely different issue: Did the Commission's information collection satisfy the requirements of the Paperwork Reduction Act?

That distinct PRA inquiry offers no opportunity for OMB to review – much less overturn – any judgment by this Court concerning the specific issues presented by the

¹⁶ See, e.g., Hayburn's Case, *supra* (statute authorized Secretary of War to review court's judgment concerning war pensions for invalid veterans); United States v. Ferreira, 54 U.S. (13 How.) 40, 42 (1852) (statute authorized Secretary of Treasury to pay restitution awarded by a district judge if the Secretary is satisfied that the award is “just and equitable”).

petitioners in this case. Stated differently, a decision by OMB under the PRA to approve, disapprove, or require modifications to the Commission's information collection would have no bearing on any judgment by this Court regarding petitioner's statutory authority, notice, and APA challenges to the rule. Because there would be no Executive Branch review of this Court's judgment, Hayburn's Case and its progeny do not render this case nonjusticiable.

II. CONSIDERATIONS OF PRUDENTIAL RIPENESS SUPPORT HOLDING THIS CASE IN ABEYANCE PENDING THE OMB REVIEW PROCESS

Although we do not believe that decisions such as Hayburn's Case support abeyance here, the related justiciability doctrine of prudential ripeness, as recently explicated by this Court in Devia, does. The ripeness doctrine reflects a judgment that federal courts should avoid review of abstract or unnecessary issues in the absence of concrete harm.¹⁷ As this Court has put it, “the ‘usually unspoken element of the rationale’ is this: ‘If we do not decide [the claim] now, we may never need to. Not only does this rationale protect the expenditure of judicial resources, but it comports with our theoretical role as the government branch of last resort. Article III courts should not make decisions unless they have to.’”¹⁸ Even agency action that is “final” within the meaning of the Administrative Procedure Act can be unripe and therefore not immediately amenable to judicial review.¹⁹

¹⁷ Devia, 492 F.3d at 424.

¹⁸ Id., quoting National Treasury Employees Union v. United States, 101 F.3d 1423, 1431 (D.C. Cir. 1996).

¹⁹ Toca Producers v. FERC, 411 F.3d 262, 266 (D.C. Cir. 2005) (citing 5 U.S.C. § 704).

Courts consider two principal factors when considering whether a dispute is ripe: “the fitness of the issues for judicial decision ... and the hardship to the parties of withholding court consideration.”²⁰ The backup power rule is not now ripe under this standard.

1. In considering whether agency action is fit for judicial determination, courts take into account, *inter alia*, whether such action is “‘sufficiently final’” to warrant immediate review.²¹ “[W]hen an agency decision may never have ‘its effects felt in a concrete way by the challenging parties,’” this Court has held that “the prospect of entangling ourselves in a challenge to such a decision is an element of the fitness determination as well.”²² Even when a case presents only legal issues that might otherwise be amenable to immediate review, it may not be ripe where judicial intervention could ultimately prove unnecessary, as “[f]ederal courts cannot – and should not – spend their scarce resources on what amounts to shadow boxing.”²³

In light of these principles, the backup power rule is not sufficiently final to justify immediate judicial review. Before the information collection component of the backup power rule lawfully can be put into effect, the PRA requires that the collection of information be reviewed and approved by OMB (or reaffirmed by the Commission over an OMB disapproval).²⁴ And because no aspect of the backup power rule will become

²⁰ National Park Hospitality Ass’n v. Department of the Interior, 538 U.S. 803, 808 (2003).

²¹ Devia, 492 F.3d at 424, quoting Atlantic States Legal Foundation, Inc. v. EPA, 325 F.3d 281, 284 (D.C. Cir. 2003) (further quotation reference omitted).

²² Id., quoting Abbott Labs., 387 U.S. at 148-49.

²³ Id., quoting McInnis-Misenor v. Maine Medical Ctr., 319 F.3d 63, 72 (1st Cir. 2003) (Boudin, J.) (further quotation reference omitted).

²⁴ 5 C.F.R. § 1320.5(a). See 44 U.S.C. §§ 3507(f)(1), 3512.

effective until that step is completed, Reconsideration Order, 22 FCC Rcd at 18032 ¶ 46 (J.A. 829), the rule currently imposes no legal obligations upon the petitioners or upon anyone else.

Moreover, any future consequences and obligations that might arise from the Commission's promulgation of the backup power rule depends upon future events – in particular, the specifics of OMB's decision – and possibly the Commission's response to that decision – at the conclusion of the PRA review process. If OMB approves the information collection in the backup power rule, the only further administrative action needed for the rule to take effect would be publication of OMB's approval in the Federal Register. In the alternative, however, OMB could direct significant changes to the information collection in the rule, which, absent an agency vote to override, could result in the Commission deciding to make material changes to the regulation under review. Or OMB could disapprove the information collection, which potentially could prevent the rule in its entirety from ever taking effect. Thus, not only is the agency action challenged in this case subject to further review by another administrative agency, but the decisions of the reviewing agency will in large part determine what, if any, rights and obligations flow from the challenged agency action.

Deferring review until completion of the PRA review process likewise advances the “central judicial interest” in avoiding potentially unnecessary adjudication.²⁵ If OMB disapproves the information collection in the backup power rule and the Commission does not vote to override that action, the rule will not become effective in its current form. Deferring review by holding this case in abeyance in such circumstances would

²⁵ TRT Telecommunications Corp. v. FCC, 876 F.2d 134, 140 (D.C. Cir. 1989) (internal quotation marks omitted). See Devia, 492 F.3d at 424.

prevent the needless expenditure of judicial resources and would advance “the policy of judicial restraint from unnecessary decisions.”²⁶

2. Withholding review will not cause substantial hardship to any party. In determining whether such hardship exists as part of a ripeness inquiry, a court evaluates whether the impact of the administrative action could “be felt immediately by those subject to it in conducting their day-to-day affairs.”²⁷ “[M]ere uncertainty as to the validity of a legal rul[ing]” does not qualify as hardship.²⁸

The promulgation of the backup power rule does not subject the petitioners or intervenors to any immediate harm, let alone cause them the “direct and immediate” hardship that is necessary to satisfy the second part of the ripeness test.²⁹ The PRA and its implementing regulations bar the Commission from imposing the collection of information requirement that is an integral part of the backup power rule “in advance” of the completion of the OMB review and approval process.³⁰ In addition, the Commission has determined that no part of the backup power rule – including those parts that do not involve information collections – will go into effect until “the date of Federal Register notice announcing OMB approval.”³¹ Finally, this Court has stayed the effective date of the rule, and that stay would remain in effect during any period of abeyance. Under these circumstances, the backup power rule will not have “its effects felt in a concrete way by

²⁶ Devia, 492 F.3d at 424, quoting McInnis-Misenor, 319 F.3d at 70.

²⁷ Toilet Goods Ass’n, Inc. v. Gardner, 387 U.S. 158, 164 (1967).

²⁸ Devia, 492 F.3d at 424, quoting National Park Hospitality Ass’n, 538 U.S. at 811.

²⁹ Abbott Labs., 387 U.S. at 152.

³⁰ 5 C.F.R. § 1320.5(a). See 44 U.S.C. § 3512.

³¹ Reconsideration Order, 22 FCC Rcd at 18032 ¶ 46 (J.A. 829).

the challenging parties,”³² because it does not “command anyone to do anything or to refrain from doing anything” and “creates[s] no legal rights or obligations.”³³

3. Nor will a judicial determination that the lawfulness of the backup power rule is not subject to immediate review preclude judicial review entirely. Upon concluding that a case is prudentially unripe, the Court has discretion to “hold the case in abeyance – as compared to dismissing the petitions.”³⁴ In this case, deferring review until the PRA process has run its course would enable the Court to entertain petitioners’ challenges to the lawfulness of the rule, if that should prove necessary, at a time when the harm to petitioners is more certain and more defined. And in the event that the OMB process results in the rule never becoming effective, the Court will have avoided issuing what amounted to “an advisory opinion.”³⁵

³² Devia, 492 F.3d at 424.

³³ Ohio Forestry Ass’n v. Sierra Club, 523 U.S. 726, 733 (1998).

³⁴ Devia, 492 F.3d at 426. See also Town of Stratford v. FAA, 285 F.3d 84, reh’g denied, 292 F.3d 251 (D.C. Cir. 2002) (holding case in abeyance after finding the case to be prudentially unripe).

³⁵ Devia, 492 F.3d at 426.

CONCLUSION

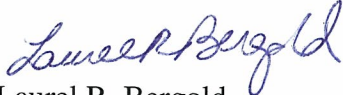
The Court should exercise its discretion to hold this case in abeyance pending completion of the PRA process.

Respectfully submitted,

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May 19, 2008

STATUTORY APPENDIX

44 U.S.C. § 3507

44 U.S.C. § 3512

5 C.F.R. § 1320.5(a)

5 C.F.R. § 1320.12

UNITED STATES CODE ANNOTATED
TITLE 44. PUBLIC PRINTING AND DOCUMENTS
CHAPTER 35 - COORDINATION OF FEDERAL INFORMATION POLICY
SUBCHAPTER I - FEDERAL INFORMATION POLICY

§ 3507. Public information collection activities; submission to Director; approval and delegation

(a) An agency shall not conduct or sponsor the collection of information unless in advance of the adoption or revision of the collection of information--

(1) the agency has--

(A) conducted the review established under section 3506(c)(1);

(B) evaluated the public comments received under section 3506(c)(2);

(C) submitted to the Director the certification required under section 3506(c)(3), the proposed collection of information, copies of pertinent statutory authority, regulations, and other related materials as the Director may specify; and

(D) published a notice in the Federal Register--

(i) stating that the agency has made such submission; and

(ii) setting forth--

(I) a title for the collection of information;

(II) a summary of the collection of information;

(III) a brief description of the need for the information and the proposed use of the information;

(IV) a description of the likely respondents and proposed frequency of response to the collection of information;

(V) an estimate of the burden that shall result from the collection of information; and

(VI) notice that comments may be submitted to the agency and Director;

44 U.S.C. § 3507 (cont'd)

(2) the Director has approved the proposed collection of information or approval has been inferred, under the provisions of this section; and

(3) the agency has obtained from the Director a control number to be displayed upon the collection of information.

(b) The Director shall provide at least 30 days for public comment prior to making a decision under subsection (c), (d), or (h), except as provided under subsection (j).

(c)(1) For any proposed collection of information not contained in a proposed rule, the Director shall notify the agency involved of the decision to approve or disapprove the proposed collection of information.

(2) The Director shall provide the notification under paragraph (1), within 60 days after receipt or publication of the notice under subsection (a)(1)(D), whichever is later.

(3) If the Director does not notify the agency of a denial or approval within the 60-day period described under paragraph (2)--

(A) the approval may be inferred;

(B) a control number shall be assigned without further delay; and

(C) the agency may collect the information for not more than 1 year.

(d)(1) For any proposed collection of information contained in a proposed rule--

(A) as soon as practicable, but no later than the date of publication of a notice of proposed rulemaking in the Federal Register, each agency shall forward to the Director a copy of any proposed rule which contains a collection of information and any information requested by the Director necessary to make the determination required under this subsection; and

(B) within 60 days after the notice of proposed rulemaking is published in the Federal Register, the Director may file public comments pursuant to the standards set forth in section 3508 on the collection of information contained in the proposed rule;

(2) When a final rule is published in the Federal Register, the agency shall explain--

(A) how any collection of information contained in the final rule responds to the comments, if any, filed by the Director or the public; or

(B) the reasons such comments were rejected.

44 U.S.C. § 3507 (cont'd)

(3) If the Director has received notice and failed to comment on an agency rule within 60 days after the notice of proposed rulemaking, the Director may not disapprove any collection of information specifically contained in an agency rule.

(4) No provision in this section shall be construed to prevent the Director, in the Director's discretion--

(A) from disapproving any collection of information which was not specifically required by an agency rule;

(B) from disapproving any collection of information contained in an agency rule, if the agency failed to comply with the requirements of paragraph (1) of this subsection;

(C) from disapproving any collection of information contained in a final agency rule, if the Director finds within 60 days after the publication of the final rule that the agency's response to the Director's comments filed under paragraph (2) of this subsection was unreasonable; or

(D) from disapproving any collection of information contained in a final rule, if--

(i) the Director determines that the agency has substantially modified in the final rule the collection of information contained in the proposed rule; and

(ii) the agency has not given the Director the information required under paragraph (1) with respect to the modified collection of information, at least 60 days before the issuance of the final rule.

(5) This subsection shall apply only when an agency publishes a notice of proposed rulemaking and requests public comments.

(6) The decision by the Director to approve or not act upon a collection of information contained in an agency rule shall not be subject to judicial review.

(e)(1) Any decision by the Director under subsection (c), (d), (h), or (j) to disapprove a collection of information, or to instruct the agency to make substantive or material change to a collection of information, shall be publicly available and include an explanation of the reasons for such decision.

(2) Any written communication between the Administrator of the Office of Information and Regulatory Affairs, or any employee of the Office of Information and Regulatory Affairs, and an agency or person not employed by the Federal Government concerning a proposed collection of information shall be made available to the public.

44 U.S.C. § 3507 (cont'd)

(3) This subsection shall not require the disclosure of--

(A) any information which is protected at all times by procedures established for information which has been specifically authorized under criteria established by an Executive order or an Act of Congress to be kept secret in the interest of national defense or foreign policy; or

(B) any communication relating to a collection of information which is not approved under this subchapter, the disclosure of which could lead to retaliation or discrimination against the communicator.

(f)(1) An independent regulatory agency which is administered by 2 or more members of a commission, board, or similar body, may by majority vote void--

(A) any disapproval by the Director, in whole or in part, of a proposed collection of information of that agency; or

(B) an exercise of authority under subsection (d) of section 3507 concerning that agency.

(2) The agency shall certify each vote to void such disapproval or exercise to the Director, and explain the reasons for such vote. The Director shall without further delay assign a control number to such collection of information, and such vote to void the disapproval or exercise shall be valid for a period of 3 years.

(g) The Director may not approve a collection of information for a period in excess of 3 years.

(h)(1) If an agency decides to seek extension of the Director's approval granted for a currently approved collection of information, the agency shall--

(A) conduct the review established under section 3506(c), including the seeking of comment from the public on the continued need for, and burden imposed by the collection of information; and

(B) after having made a reasonable effort to seek public comment, but no later than 60 days before the expiration date of the control number assigned by the Director for the currently approved collection of information, submit the collection of information for review and approval under this section, which shall include an explanation of how the agency has used the information that it has collected.

44 U.S.C. § 3507 (cont'd)

(2) If under the provisions of this section, the Director disapproves a collection of information contained in an existing rule, or recommends or instructs the agency to make a substantive or material change to a collection of information contained in an existing rule, the Director shall--

(A) publish an explanation thereof in the Federal Register; and

(B) instruct the agency to undertake a rulemaking within a reasonable time limited to consideration of changes to the collection of information contained in the rule and thereafter to submit the collection of information for approval or disapproval under this subchapter.

(3) An agency may not make a substantive or material modification to a collection of information after such collection has been approved by the Director, unless the modification has been submitted to the Director for review and approval under this subchapter.

(i)(1) If the Director finds that a senior official of an agency designated under section 3506(a) is sufficiently independent of program responsibility to evaluate fairly whether proposed collections of information should be approved and has sufficient resources to carry out this responsibility effectively, the Director may, by rule in accordance with the notice and comment provisions of chapter 5 of title 5, United States Code, delegate to such official the authority to approve proposed collections of information in specific program areas, for specific purposes, or for all agency purposes.

(2) A delegation by the Director under this section shall not preclude the Director from reviewing individual collections of information if the Director determines that circumstances warrant such a review. The Director shall retain authority to revoke such delegations, both in general and with regard to any specific matter. In acting for the Director, any official to whom approval authority has been delegated under this section shall comply fully with the rules and regulations promulgated by the Director.

(j)(1) The agency head may request the Director to authorize a collection of information, if an agency head determines that--

(A) a collection of information--

(i) is needed prior to the expiration of time periods established under this subchapter; and

(ii) is essential to the mission of the agency; and

44 U.S.C. § 3507 (cont'd)

(B) the agency cannot reasonably comply with the provisions of this subchapter because--

(i) public harm is reasonably likely to result if normal clearance procedures are followed;

(ii) an unanticipated event has occurred; or

(iii) the use of normal clearance procedures is reasonably likely to prevent or disrupt the collection of information or is reasonably likely to cause a statutory or court ordered deadline to be missed.

(2) The Director shall approve or disapprove any such authorization request within the time requested by the agency head and, if approved, shall assign the collection of information a control number. Any collection of information conducted under this subsection may be conducted without compliance with the provisions of this subchapter for a maximum of 180 days after the date on which the Director received the request to authorize such collection.

UNITED STATES CODE ANNOTATED
TITLE 44. PUBLIC PRINTING AND DOCUMENTS
CHAPTER 35 - COORDINATION OF FEDERAL INFORMATION POLICY
SUBCHAPTER I - FEDERAL INFORMATION POLICY

§ 3512. Public protection

(a) Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information that is subject to this subchapter if--

(1) the collection of information does not display a valid control number assigned by the Director in accordance with this subchapter; or

(2) the agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.

(b) The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.

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CHAPTER III. OFFICE OF MANAGEMENT AND BUDGET
SUBCHAPTER B. OMB DIRECTIVES
PART 1320 CONTROLLING PAPERWORK BURDENS ON THE PUBLIC

§ 1320.5 General requirements.

(a) An agency shall not conduct or sponsor a collection of information unless, in advance of the adoption or revision of the collection of information--

(1) The agency has--

(i) Conducted the review required in § 1320.8;

(ii) Evaluated the public comments received under § 1320.8(d) and § 1320.11;

(iii) Submitted to the Director, in accordance with such procedures and in such form as OMB may specify,

(A) The certification required under § 1320.9,

(B) The proposed collection of information in accordance with § 1320.10, § 1320.11, or § 1320.12, as appropriate,

(C) An explanation for the decision that it would not be appropriate, under § 1320.8(b)(1), for a proposed collection of information to display an expiration date;

(D) An explanation for a decision to provide for any payment or gift to respondents, other than remuneration of contractors or grantees;

(E) A statement indicating whether (and if so, to what extent) the proposed collection of information involves the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses, and an explanation for the decision;

(F) A summary of the public comments received under § 1320.8(d), including actions taken by the agency in response to the comments, and the date and page of the publication in the Federal Register of the notice therefor; and

5 C.F.R. § 1320.5 (cont'd)

(G) Copies of pertinent statutory authority, regulations, and such related supporting materials as OMB may request; and

(iv) Published, except as provided in § 1320.13(d), a notice in the Federal Register--

(A) Stating that the agency has made such submission; and

(B) Setting forth--

(1) A title for the collection of information;

(2) A summary of the collection of information;

(3) A brief description of the need for the information and proposed use of the information;

(4) A description of the likely respondents, including the estimated number of likely respondents, and proposed frequency of response to the collection of information;

(5) An estimate of the total annual reporting and recordkeeping burden that will result from the collection of information;

(6) Notice that comments may be submitted to OMB; and

(7) The time period within which the agency is requesting OMB to approve or disapprove the collection of information if, at the time of submittal of a collection of information for OMB review under § 1320.10, § 1320.11 or § 1320.12, the agency plans to request or has requested OMB to conduct its review on an emergency basis under § 1320.13; and

(2) OMB has approved the proposed collection of information, OMB's approval has been inferred under § 1320.10(c), § 1320.11(i), or § 1320.12(e), or OMB's disapproval has been voided by an independent regulatory agency under § 1320.15; and

(3) The agency has obtained from the Director a control number to be displayed upon the collection of information.

(b) In addition to the requirements in paragraph (a) of this section, an agency shall not conduct or sponsor a collection of information unless:

5 C.F.R. § 1320.5 (cont'd)

(1) The collection of information displays a currently valid OMB control number; and

(2)(i) The agency informs the potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

(ii) An agency shall provide the information described in paragraph (b)(2)(i) of this section in a manner that is reasonably calculated to inform the public.

(A) In the case of forms, questionnaires, instructions, and other written collections of information sent or made available to potential respondents (other than in an electronic format), the information described in paragraph (b)(2)(i) of this section is provided "in a manner that is reasonably calculated to inform the public" if the agency includes it either on the form, questionnaire or other collection of information, or in the instructions for such collection.

(B) In the case of forms, questionnaires, instructions, and other written collections of information sent or made available to potential respondents in an electronic format, the information described in paragraph (b)(2)(i) of this section is provided "in a manner that is reasonably calculated to inform the public" if the agency places the currently valid OMB control number in the instructions, near the title of the electronic collection instrument, or, for on-line applications, on the first screen viewed by the respondent.

(C) In the case of collections of information published in regulations, guidelines, and other issuances in the Federal Register, the information described in paragraph (b)(2)(i) of this section is provided "in a manner that is reasonably calculated to inform the public" if the agency publishes such information in the Federal Register (for example, in the case of a collection of information in a regulation, by publishing such information in the preamble or the regulatory text, or in a technical amendment to the regulation, or in a separate notice announcing OMB approval of the collection of information). In the case of a collection of information published in an issuance that is also included in the Code of Federal Regulations, publication of such information in the Code of Federal Regulations constitutes an alternative means of providing it "in a manner that is reasonably calculated to inform the public." In the case of a collection of information published in an issuance that is also included in the Code of Federal Regulations, OMB recommends for ease of future reference that, even where an agency has already provided such information "in a manner that is reasonably calculated to inform the public" by publishing it in the Federal Register as a separate notice or in the preamble for the final rule (rather than in the regulatory text for the final rule or in a technical amendment to the final rule), the agency also publish such information along with a table or codified section of OMB control numbers to be

5 C.F.R. § 1320.5 (cont'd)

included in the Code of Federal Regulations (see § 1320.3(f)(3)).

(D) In other cases, and where OMB determines in advance in writing that special circumstances exist, to use other means that are reasonably calculated to inform the public of the information described in paragraph (b)(2)(i) of this section.

(c)(1) Agencies shall submit all collections of information, other than those contained in proposed rules published for public comment in the Federal Register or in current regulations that were published as final rules in the Federal Register, in accordance with the requirements in § 1320.10. Agencies shall submit collections of information contained in interim final rules or direct final rules in accordance with the requirements of § 1320.10.

(2) Agencies shall submit collections of information contained in proposed rules published for public comment in the Federal Register in accordance with the requirements in § 1320.11.

(3) Agencies shall submit collections of information contained in current regulations that were published as final rules in the Federal Register in accordance with the requirements in § 1320.12.

(4) Special rules for emergency processing of collections of information are set forth in § 1320.13.

(5) For purposes of time limits for OMB review of collections of information, any submission properly submitted and received by OMB after 12:00 noon will be deemed to have been received on the following business day.

(d)(1) To obtain OMB approval of a collection of information, an agency shall demonstrate that it has taken every reasonable step to ensure that the proposed collection of information:

(i) Is the least burdensome necessary for the proper performance of the agency's functions to comply with legal requirements and achieve program objectives;

(ii) Is not duplicative of information otherwise accessible to the agency; and

(iii) Has practical utility. The agency shall also seek to minimize the cost to itself of collecting, processing, and using the information, but shall not do so by means of shifting disproportionate costs or burdens onto the public.

(2) Unless the agency is able to demonstrate, in its submission for OMB clearance, that such characteristic of the collection of information is necessary to satisfy

5 C.F.R. § 1320.5 (cont'd)

statutory requirements or other substantial need, OMB will not approve a collection of information--

- (i) Requiring respondents to report information to the agency more often than quarterly;
 - (ii) Requiring respondents to prepare a written response to a collection of information in fewer than 30 days after receipt of it;
 - (iii) Requiring respondents to submit more than an original and two copies of any document;
 - (iv) Requiring respondents to retain records, other than health, medical, government contract, grant-in-aid, or tax records, for more than three years;
 - (v) In connection with a statistical survey, that is not designed to produce valid and reliable results that can be generalized to the universe of study;
 - (vi) Requiring the use of a statistical data classification that has not been reviewed and approved by OMB;
 - (vii) That includes a pledge of confidentiality that is not supported by authority established in statute or regulation, that is not supported by disclosure and data security policies that are consistent with the pledge, or which unnecessarily impedes sharing of data with other agencies for compatible confidential use; or
 - (viii) Requiring respondents to submit proprietary, trade secret, or other confidential information unless the agency can demonstrate that it has instituted procedures to protect the information's confidentiality to the extent permitted by law.
- (e) OMB shall determine whether the collection of information, as submitted by the agency, is necessary for the proper performance of the agency's functions. In making this determination, OMB will take into account the criteria set forth in paragraph (d) of this section, and will consider whether the burden of the collection of information is justified by its practical utility. In addition:
- (1) OMB will consider necessary any collection of information specifically mandated by statute or court order, but will independently assess any collection of information to the extent that the agency exercises discretion in its implementation; and

5 C.F.R. § 1320.5 (cont'd)

(2) OMB will consider necessary any collection of information specifically required by an agency rule approved or not acted upon by OMB under § 1320.11 or § 1320.12, but will independently assess any such collection of information to the extent that it deviates from the specifications of the rule.

(f) Except as provided in § 1320.15, to the extent that OMB determines that all or any portion of a collection of information is unnecessary, for any reason, the agency shall not engage in such collection or portion thereof. OMB will reconsider its disapproval of a collection of information upon the request of the agency head or Senior Official only if the sponsoring agency is able to provide significant new or additional information relevant to the original decision.

(g) An agency may not make a substantive or material modification to a collection of information after such collection of information has been approved by OMB, unless the modification has been

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§ 1320.12 Clearance of collections of information in current rules.

Agencies shall submit collections of information contained in current rules that were published as final rules in the Federal Register in accordance with the following procedures:

(a) In the case of a collection of information contained in a published current rule which has been approved by OMB and has a currently valid OMB control number, the agency shall:

(1) Conduct the review established under § 1320.8, including the seeking of public comment under § 1320.8(d); and

(2) After having made a reasonable effort to seek public comment, but no later than 60 days before the expiration date of the OMB control number for the currently approved collection of information, submit the collection of information for review and approval under this Part, which shall include an explanation of how the agency has used the information that it has collected.

(b)(1) In the case of a collection of information contained in a published current rule that was not required to be submitted for OMB review under the Paperwork Reduction Act at the time the collection of information was made part of the rule, but which collection of information is now subject to the Act and this Part, the agency shall:

(i) Conduct the review established under § 1320.8, including the seeking of public comment under § 1320.8(d); and

(ii) After having made a reasonable effort to seek public comment, submit the collection of information for review and approval under this Part, which shall include an explanation of how the agency has used the information that it has collected.

(2) The agency may continue to conduct or sponsor the collection of information while the submission is pending at OMB. In the case of a collection of information not previously approved, approval shall be granted for such period, which shall not exceed 60 days, unless extended by the Director for an additional 60 days, and an OMB control number assigned. Upon assignment of the OMB control number, and in accordance with § 1320.3(f) and § 1320.5(b), the agency shall display the number and

5 C.F.R. § 1320.12 (cont'd)

inform the potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

(c) On or before the day of submission to OMB under paragraphs (a) or (b) of this section, the agency shall, in accordance with the requirements set forth in § 1320.5(a)(1)(iv), forward a notice to the Federal Register stating that OMB review is being sought. The notice shall direct requests for copies of the collection of information and supporting documentation to the agency, and shall request that comments be submitted to OMB within 30 days of the notice's publication. The notice shall direct comments to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for [name of agency]. A copy of the notice submitted to the Federal Register, together with the date of expected publication, shall be included in the agency's submission to OMB.

(d) Within 60 days after receipt of the collection of information or publication of the notice under paragraph (c) of this section, whichever is later, OMB shall notify the agency involved of its decision to approve, to instruct the agency to make a substantive or material change to, or to disapprove, the collection of information, and shall make such decision publicly available. OMB shall provide at least 30 days for public comment after receipt of the proposed collection of information before making its decision, except as provided under § 1320.13.

(e)(1) Upon approval of a collection of information, OMB shall assign an OMB control number and an expiration date. OMB shall not approve any collection of information for a period longer than three years. Approval of any collection of information submitted under this section will be for the full three-year period, unless OMB determines that there are special circumstances requiring approval for a shorter period.

(2) If OMB fails to notify the agency of its approval, instruction to make substantive or material change, or disapproval within the 60-day period, the agency may request, and OMB shall assign without further delay, an OMB control number that shall be valid for not more than one year.

(3) As provided in § 1320.5(b) and § 1320.6(a), an agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

5 C.F.R. § 1320.12 (cont'd)

(f)(1) If OMB disapproves a collection of information contained in an existing rule, or instructs the agency to make a substantive or material change to a collection of information contained in an existing rule, OMB shall:

(i) Publish an explanation thereof in the Federal Register; and

(ii) Instruct the agency to undertake a rulemaking within a reasonable time limited to consideration of changes to the collection of information contained in the rule and thereafter to submit the collection of information for approval or disapproval under § 1320.10 or § 1320.11, as appropriate; and

(iii) Extend the existing approval of the collection of information (including an interim approval granted under paragraph (b) of this section) for the duration of the period required for consideration of proposed changes, including that required for OMB approval or disapproval of the collection of information under § 1320.10 or § 1320.11, as appropriate.

(2) Thereafter, the agency shall, within a reasonable period of time not to exceed 120 days, undertake such procedures as are necessary in compliance with the Administrative Procedure Act and other applicable law to amend or rescind the collection of information, and shall notify the public through the Federal Register. Such notice shall identify the proposed changes in the collections of information and shall solicit public comment on retention, change, or rescission of such collections of information. If the agency employs notice and comment rulemaking procedures for amendment or rescission of the collection of information, publication of the above in the Federal Register and submission to OMB shall initiate OMB clearance procedures under section 3507(d) of the Act and § 1320.11. All procedures shall be completed within a reasonable period of time to be determined by OMB in consultation with the agency.

(g) OMB may disapprove, in whole or in part, any collection of information subject to the procedures of this section, if the agency:

(1) Has refused within a reasonable time to comply with an OMB instruction to submit the collection of information for review;

(2) Has refused within a reasonable time to initiate procedures to change the collection of information; or

(3) Has refused within a reasonable time to publish a final rule continuing the collection of information, with such changes as may be appropriate, or otherwise complete the procedures for amendment or rescission of the collection of information.

5 C.F.R. § 1320.12 (cont'd)

(h)(1) Upon disapproval by OMB of a collection of information subject to this section, except as provided in paragraph (f)(1)(iii) of this section, the OMB control number assigned to such collection of information shall immediately expire, and no agency shall conduct or sponsor such collection of information. Any such disapproval shall constitute disapproval of the collection of information contained in the Notice of Proposed Rulemaking or other submissions, and also of the preexisting information collection instruments directed at the same collection of information and therefore constituting essentially the same collection of information.

(2) The failure to display a currently valid OMB control number for a collection of information contained in a current rule, or the failure to inform the potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number, does not, as a legal matter, rescind or amend the rule; however, such absence will alert the public that either the agency has failed to comply with applicable legal requirements for the collection of information or the collection of information has been disapproved, and that therefore the portion of the rule containing the collection of information has no legal force and effect and the public protection provisions of 44 U.S.C. 3512 apply.

(i) Prior to the expiration of OMB's approval of a collection of information in a current rule, OMB may decide on its own initiative, after consultation with the agency, to review the collection of information. Such decisions will be made only when relevant circumstances have changed or the burden estimates provided by the agency at the time of initial submission were materially in error. Upon notification by OMB of its decision to review the collection of information, the agency shall submit it to OMB for review under this Part.